SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 853

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Petitioner,

vs.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October Term, 1967

No. 853

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Petitioner,

vs.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PREFATORY NOTE.

Petitioner, Northwest Airlines, Inc., does not set forth any jurisdictional grounds upon which its petition is based. Rather, it simply states that it is based upon 28 USC § 1254(1). Nowhere is this Court's Rule 19 referred to nor are any of the reasons stated therein urged as a basis of jurisdiction.

Actually, the essence of the petition is that the district judge should have arrived at a different conclusion on the basis of the evidence in the case.

QUESTIONS PRESENTED.

More properly stated, they are:

1. Should this Court interfere with findings of fact, supported by evidence and approved by a Court of Appeals?

2. Should this Court deviate from the doctrine of *res ipsa loquitur*, as announced in many cases, including *Sweeney* v. *Erving*, 228 U.S. 233, and *Johnson* v. *United States*, 333 U.S. 46?

STATEMENT OF THE CASE.

Petitioner's sketchy factual statement requires an addendum.

Petitioner, Northwest Airlines, had an agreement with the Military Air Transport Service to fly personnel to and from various Air Force bases. (App. 25)[1] The flight in which libellant's decedent was killed (flight 293), was scheduled to fly from McChord Air Force base, Washington to Elmendorf Air Force base in Alaska. (App. 25)

The Area Over Which The Flight Was Planned.

This flight would pass over a fix known as Domestic Annette on an airway known as airway 1310. This is a position reporting point from bearings taken from two low-frequency radio stations, one located on Sand Spit Island, British Columbia, the other on Annette Island, Alaska. (App. 47) It is difficult to make a fix in this area, for two reasons: (a) precipitation, and (b) problems inherent in a low-frequency station. (App. 37, 38)

Low-frequency stations have for years been known to be a source of difficulty in determining one's position. (App. 37, 38, 47, 65) It is for this reason that they have been replaced by OMNI stations. (App. 37, 38) When one is going northwest over this particular route it is particularly difficult to ascertain one's position. (App. 38, 39)

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[1] "App." refers to the printed appendix filed in the Court of Appeals and in this Court, "A. App." to the additional appendix and "A." to the appendix attached to the petition filed herein.

The weather phenomenon encountered in the Sand Spit to Domestic Sitka[2] portion of this flight was occasional heavy precipitation static while in the clouds and it reached its worst point in the vicinity of Domestic Annette. (App. 42)

Air-borne radar was in use in the Domestic Annette area at this time. (App. 48) It paints a very limited and poor picture to any operation south of that area. (App. 28) The two radio facilities are the primary means of establishing a position over Domestic Annette, since weather radar may not show ground objects clearly when there is a great deal of cloud cover. (App. 68)

The Flight Plan Altitude.

Flight 293 departed McChord at 8:33 A.M. (App. 26; A. App. 5) Its flight plan called for it to fly at 14,000 feet. (Resp. Ex. 8, App. 139)

The weather forecast was light rime icing[3] becoming frequently moderate to heavy rime icing after 1800 or 10:00 A.M. (App. 51) Prior to the departure of flight 293, Ramsay, the weather forecaster at McChord Air Base told the pilot before he took off of icing at 14,000 feet, but received no comment. He even read the flight plan to the captain and in so doing noted that he would

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[2] Domestic Annette is between Sand Spit Island and Domestic Sitka. (App. 57) Domestic Sitka was another place where one's position could be ascertained. (App. 40)

[3] Rime ice is a type of ice that accretes on the aircraft while it is in the air and can affect the aircraft in several ways. Two of the ways are that it adds weight to the aircraft and can spoil the lifting efficiency of the wings. (App. 74) It can be hazardous. (App. 81)

be flying at 14,000 feet and asked him if that was all correct. The pilot's response was, "You have it correct." (App. 57)

As Ramsay said, "We can inform the pilot of where the icing is, and if he wants to take off a flight through severe icing that is his problem as long as we have it down on his clearance. I had given this pilot on the brief light to moderate rime icing up to 14,000 feet. That would be in the area between Sand Spit and Domestic Sitka." Domestic Annette is, of course, in between those points. Ramsay would have recommended 15,000 or 16,000 feet, or above 15,000. (App. 57)

It is, of course, fundamental that rime ice can be a hazard. (App. 81)

The initial flight plan of Pacific Northern Airlines Flight No. 5, which was to fly in the same area about the same time as Flight 293, called for an altitude of 16,000 feet. Captain William D. Kellogg, its pilot, had received the weather forecast on 14,000 but then planned his flight for 16,000. (App. 39, 40, 42)

When the Pacific Northern Airlines Flight No. 5 was cruising at 16,000 feet, it obtained a clearance to go to 18,000 feet at 10:30 A.M. because of icing conditions. (App. 40, 43) It was then in the area of the Domestic Annette fix. (App. 167, 168) After reaching 18,000 feet, it was only intermittently on top of the clouds. (App. 41)

Meanwhile, Kellogg became concerned with the loss of communications with 293 and asked clearance to 20,000 feet to give 293 adequate room in the event of an emergency. (App. 40) Kellogg made repeated efforts to communicate with 293, and assumed there was a possibility

that it had a complete electrical failure and was unable to either communicate or use its navigational radio. (A. App. 1) He asked his passengers to keep a lookout for flight 293. (A. App. 2)

The ill-fated flight 293 was cruising at 14,000 feet when at 11:06 A.M. it requested permission over the radio to climb to 18,000 feet. No reason was assigned for the request. It was last heard from at 11:07 A.M., June 3, 1963. (App. 28, 29)

At 12:35 P.M. an emergency was declared and at 8:22 P.M. that evening a Royal Canadian aircraft noticed debris, which was confirmed to be flight 293.

There was no evidence of an in-flight fire or explosion, nor were there any missile firings in the area of the accident. The only other aircraft in the vicinity was Pacific Northern Airlines flight 5. (App. 29) The estimated point of impact between flight 293 and the water was 116 nautical miles west-southwest of Annette Island, Alaska, outside airway 1310. (App. 65, 76)

There was no explanation of the cause of this crash in the ocean.

REASONS FOR DENIAL OF THE PETITION.

Prefatory Statement.

Petitioner Northwest Airlines does not urge the findings of fact made by the district court and affirmed by the Court of Appeals are erroneous. This Court has held in admiralty cases, that no reviewing court can interfere with a finding of fact unless it "is left with the definite and firm conviction that a mistake has been committed." *Guzman* v. *Pichirilo*, 369 U.S. 698, 702.

It is also clear that petitioner, in the Court of Appeals and in this Court, admits the application of the doctrine of res ipsa loquitur in airplane crash cases, but argues it should not be applied here, although this is a situation where the party who had exclusive control of the instrumentality has failed to explain why its aircraft plunged into the ocean.

Petitioner now argues that "libellant's only probative evidence demonstrated that an accident happened. Nothing more."

Petitioner omits these facts and findings:

1. There was an advance warning that there would be rime icing *up* to 14,000 feet in the Domestic Annette area becoming heavy after 10 A.M.

2. Notwithstanding the warning of the weatherman, the Captain for no explained reason insisted on flying at 14,000 feet.

3. When the craft was in the area where the icing was predicted to be worst, it sought clearance to

18,000 feet and was heard from for the last time at 11:07, 67 minutes after the time the forecaster predicted the heavy rime icing.

4. The pilot of another craft was informed as to the weather at 14,000 feet, but nonetheless selected 16,000 feet as his initial flight plan. Indeed, he was cleared to 18,000 feet before he became aware of the problems of flight 293. (App. 40, A. 11, 12, 13)

The district court found:

"The instrumentality which produced the death of Randall S. Cox was under the exclusive control and management of the respondent and that the occurrence in question was such as does not ordinarily occur in the absence of negligence, and, further, that there is no possibility of contributing conduct which would make Randall S. Cox responsible; that the facts herein justify a finding of negligence." (App. 169, A. 13, 14)

This, of course, is a classic statement of the doctrine of *res ipsa loquitur*.

IT IS WELL ESTABLISHED THAT WHERE AN AIRCRAFT IS UNDER THE EXCLUSIVE MANAGEMENT AND CONTROL OF PETITIONER AND SAID AIRCRAFT CRASHES, THE ABSENCE OF ANY EVIDENCE BY THE OPERATING COMPANY EXPLAINING THE CAUSE OF THE OCCURRENCE JUSTIFIES THE APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR.

Petitioner misconceives the doctrine of *res ipsa loquitur* when it urges that without evidence of specific negligence or of an unusual circumstance, the doctrine of *res ipsa loquitur* cannot satisfy libellant's duty to sustain her burden of proof.

What are the undisputed facts? Aside from the facts concerning where it was flown, the area, and the altitude, which we have set out, it is uncontradicted:

1. That libellant's decedent was a passenger for hire on petitioner's plane.

2. That petitioner had exclusive control and operation of the plane.

3. That this plane, equipped with a crew of six and carrying ninety-five passengers, crashed into the Pacific about 116 miles from Annette Island, Alaska.

4. That there was no evidence of either an in-flight fire or explosion and there were no missiles being discharged in the area.

5. That the cause of the occurrence was never shown, although it was such as does not take place in the careful operation of an air line.

The doctrine of *res ipsa loquitur* has been held to be peculiarly suitable in actions against common carriers for accidents involving airplanes because of the high degree of care required. *Smith* v. *Pennsylvania Central Airlines Corp.*, 76 F. Supp. 940 (D.C. D.C. 1948), 6 A.L.R. 2d 521. Of course, petitioner, as a common carrier by air, owed libellant's decedent the highest degree of care consistent with the practical operation of its business. *Eastern Air Lines, Inc.* v. *Silber*, 5 Cir., 324 F. 2d 38 (1963); *Arrow Aviation, Inc.* v. *Moore*, 8 Cir., 266 F. 2d 488 (1959); *Kamienski* v. *Bluebird Air Service, Inc.*, 321 Ill. App. 340 (1944).

The classic *res ipsa loquitur* case is *Johnson* v. *United States*, 333 U.S. 46. There the plaintiff was injured when,

with a fellow employee, he was on the deck of a vessel rounding in two blocks, an operation which followed the cradling of the boom. A block that was to be held by Dudder, a fellow employee, was permitted to fall and hit plaintiff while he was bending over coiling some accumulated free line. "It is not certain why the block fell." (P. 48) This court held the rule of *res ipsa loquitur* was properly invoked to afford the plaintiff a recovery.

Nor is the doctrine in any wise diluted because the action is brought under the Death on the High Seas Act on the admiralty side of the court. *Blumenthal* v. *United States,* 3 Cir., 306 F. 2d 16, was an action for the wrongful death of a civilian lost after bailing out of a disabled military aircraft over international waters between Korea and Japan. There was no precise evidence as to the cause of the accident. Recovery was allowed under this doctrine.

In *Haasman* v. *Pacific Alaska Air Express,* 100 F. Supp. 1 (D.C. Alaska, 1951), aff'd *sub nom., DesMarias* v. *Beckman,* 9 Cir., 198 F. 2d 550 (1952), cert. den., 344 U.S. 922, defendant's plane disappeared without a trace on a flight from Alaska to Seattle. There was no icing or unusual weather conditions along the route. Plaintiff relied solely upon the doctrine of *res ipsa loquitur.* Defendant urged that since the plane was never found, it had no knowledge of probable cause superior to that of the plaintiff's. This argument was specifically rejected by the Court of Appeals when it approved the District Court opinion in full which found for the plaintiff.

The language of the *Haasman* case received the complete approval of the court in *Trihey* v. *Transocean Air Lines,* 9 Cir., 255 F. 2d 824, 828-829.

In *Smith* v. *Pacific Alaska Airways, Inc.*, 9 Cir., 89 F. 2d 253 (1937), an action to recover damages for death of an airplane passenger, the plaintiff merely proved that the airplane crashed and then rested. This was held adequate for submission on the doctrine of *res ipsa loquitur*.

Citrola v. *Eastern Air Lines, Inc.*, 2 Cir., 264 F. 2d 815 involved a plane crashing while attempting to land at an airport.

Lobel v. *American Airlines*, 2 Cir., 192 F. 2d 217, cert. den., 342 U.S. 945, was an action for injuries in an air crash in Indiana. The court held it was not error to submit the case to the jury on *res ipsa loquitur*.

Once the doctrine of *res ipsa loquitur* is applicable, then, of course, petitioner's negligence is a matter to be determined by the trier of the facts. (*Citrola* v. *Eastern Air Lines, Inc.*, 2 Cir., 264 F. 2d 815, 818; *Blumenthal* v. *United States*, 3 Cir., 306 F. 2d 16, 19)

Libellant's *prima facie* case remained uncontradicted. Petitioner, upon whom then rested the burden of explaining this unusual occurrence, produced no evidence whatsoever as to its cause.

Outside the weather, the only other two possible factors are the condition of the plane and the conduct of the crew.

Petitioner urges that the plane was in excellent condition and that it made a showing of due care. Yet the craft was under its control, through the conduct of its employees. What the crew did or failed to do remained unexplained, although we know it deliberately flew at an altitude and chose a course where heavy icing was forecast. It undertook to accomplish the flight under dangerous circumstances.

Petitioner's Authorities.

Petitioner seeks to argue around *Johnson* v. *United States*, 333 U.S. 46 (1948), which was cited to the Court of Appeals.

Petitioner states the Court below "seemingly believed" that this Court's opinions regarding *res ipsa loquitur* required a full explanation of the cause of an accident. Of course, the very purpose of the doctrine is to obviate proof of specific cause when such is impossible. It seeks to distinguish *Johnson* because it was a Jones Act case and therefore, it says, the rule was unique in that owners of ships owe a duty to their employees higher than that of other defendants.

Such is incorrect.

The fundamental fact is that petitioner, as a common carrier, owed the highest degree of care to the libellant's decedent. And in airplane crashes, it is manifest that the owner of the airplane possesses knowledge superior to that of a passenger concerning circumstances involving the operation of its planes. Indeed, what more helpless situation can be imagined than that of an airplane passenger? Moreover, it is a well recognized proposition of law that an unexplained crash of an airplane comes within the ambit of the *res ipsa loquitur* doctrine.

Petitioner then alleges that the Court of Appeals misinterpreted *Sweeney* v. *Erving*, 228 U.S. 233 (1938), stating that it reasoned that a finding of negligence was "required" by *Sweeney*. Of course this is not true. The Court of Appeals said that the district court "properly applied the doctrine of *res ipsa loquitur* and that its

finding of negligence was a permissible one—warranted though not compelled * * *". (A. 4)

Ayres Marine Service v. *W. Horace Williams Co.*, 5 Cir., 213 F. 2d 27 (1954), is referred to and described a case which "conflicts in principle" with this decision.

A cursory examination of that case discloses the decree for the libellant was predicated upon specific negligence. In an affirming opinion, the Court of Appeals simply noted the district court's decision was not based on *res ipsa loquitur*. This was made very clear in the recent case of *Logan Charter Service, Inc.* v. *Cargill, Inc.*, 8 Cir., 373 F. 2d 54 (1967), where in a libel in admiralty against the owner of a tug, the Court said, at 60:

> "Appellant complains of the court's statement that the doctrine of *res ipsa loquitur* was applicable to the instant case. As a general proposition, this doctrine is applicable to admiralty cases. In the instant case, the trial court attributed liability solely to the specific negligence of the crew of the City Of Joliet. The court's conclusion was not based on the doctrine of *res ipsa loquitur*. And in this aspect, the case is analogous to *Ayres Marine Service* v. *W. Horace Williams Co.*, 213 F. 2d 27, 30 (5th Cir., 1954), where the court there properly, we think, rejected a similar contention as appellant here advances."

The only other case relied upon by petitioner is *Russell Polling & Co.* v. *Tug Alice M. Moran*, 205 F. Supp. 874 (S.D.N.Y. 1962). That was a libel in admiralty action for damages to a barge being towed by the tug. The damage to the tug was noted after the tow was ended. It was unknown whether the damage occurred during the tow or from other causes. The Court held *res ipsa loquitur* could not be used as a basis for the presumption that the damage

occurred during this particular tow. This is a universal rule in similar cases. See *Magnolia Petroleum Co.* v. *Tug Jared*, 216 F. Supp. 322 (E.D. La. 1963).

CONCLUSION.

This petition raises no question to justify granting the writ of certiorari. Petitioner merely urges that the Court, on the evidence before him, should have rendered a different result.

We respectfully submit that this petition be denied.

Respectfully submitted,

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